

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

**FILED**

March 20, 2000

Cecil Crowson, Jr.  
Appellate Court Clerk

AT KNOXVILLE

NOVEMBER SESSION, 1999

<b>STATE OF TENNESSEE,</b>	)	<b>C.C.A. NO. 03C01-9812-CR-00431</b>
	)	
Appellee,	)	
	)	
<b>VS.</b>	)	<b>SULLIVAN COUNTY</b>
	)	
<b>LADONNA KAY LAMBERT,</b>	)	<b>HON. PHYLLIS H. MILLER</b>
	)	<b>JUDGE</b>
Appellant.	)	<b>(Direct Appeal - D.U.I)</b>

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OPINION FILED \_\_\_\_\_

AFFIRMED

JERRY L. SMITH, JUDGE

## **OPINION**

The appellant, Ladonna Kay Lambert, entered a guilty plea in the Sullivan County Criminal Court to one (1) count of driving under the influence of an intoxicant. In lieu of the mandatory minimum 48 hours incarceration for a first time offender, the appellant requested that the trial court sentence her to 200 hours of community service pursuant to Tenn. Code Ann. § 55-10-403(n), which applies only to those offenders convicted in Davidson County. The trial court found that Tenn. Code Ann. § 55-10-403(n), which limited its application to Davidson County offenders, was unconstitutional. However, the trial court further determined that the appellant was statutorily ineligible for community service and sentenced her to eleven (11) months and twenty-nine (29) days, suspended after service of 48 hours in jail. On appeal, the appellant contends that Tenn. Code Ann. § 55-10-403(n) is unconstitutional as it violates the Equal Protection provisions of the federal and state constitutions. She further argues that the trial court erred in ordering her to serve 48 hours in jail. We conclude that we need not address the constitutionality of Tennessee Code Annotated Section 55-10-403(n) because, irrespective of the statute's constitutionality the appellant would be required to serve the minimum mandatory 48 hour sentence. We therefore affirm the judgment of the trial court sentencing the appellant to 48 hours incarceration in jail.

I.

On November 10, 1998, the appellant pled guilty to one (1) count of driving under the influence of an intoxicant. Prior to the trial court imposing sentence, the appellant requested, pursuant to Tenn. Code Ann. § 55-10-403(n), to perform 200 hours of community service instead of the mandated 48 hours in jail for first offenders of driving under the influence. See Tenn. Code Ann. § 55-10-403(a). Tenn. Code Ann. § 55-10-403(n) provides:

[n]otwithstanding the provisions of this section to the contrary, in counties with a metropolitan form of government and a population in excess of one hundred thousand (100,000) according to the 1990 federal census or any subsequent federal census, the judge exercising criminal jurisdiction may sentence a person convicted of violating the provisions of § 55-10-401, for the first time to perform two hundred (200) hours of public service work in a supervised public service program in lieu of the minimum period of confinement required by the provisions of subsection (a).

The trial court, after concluding that Tenn. Code Ann. § 55-10-403(n) was unconstitutional,<sup>1</sup> nonetheless found the appellant to be statutorily ineligible for community service because Sullivan County did not have a metropolitan form of government and had a population of less than 100,000<sup>2</sup>. Thus, the trial court rejected the appellant's request for community service and sentenced her to eleven (11) months and twenty-nine (29) days, suspended following service of 48 hours in the county jail. From the trial court's order, the appellant now brings this appeal.

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<sup>1</sup> The trial court provided no basis upon which it found the statute to be unconstitutional. However, a full reading of the transcript indicates that the trial court found the statute to be unconstitutional on equal protection grounds.

<sup>2</sup>This decision is somewhat curious in that having found the statute unconstitutional the trial court then applied the very terms of the statute to exclude the appellant from community service. For the reasons discussed *infra*, the trial court should have refrained from addressing the constitutional question since it is not necessary to reach that issue to find the appellant ineligible for community service.

## II.

The appellant contends that Tenn. Code Ann. § 55-10-403(n) unconstitutionally violates her rights to equal protection under the law because the statute applies only to Davidson County. She argues that she should not be denied community service merely because she was convicted in Sullivan County. Thus, she claims that equal protection mandates that the statute apply equally to all citizens of this state.

In State v. Tester, 879 S.W.2d 823 (Tenn. 1994), the Tennessee Supreme Court held that the statutory scheme in existence at that time which excluded, except for counties with a population of more than 700,000 or with a metropolitan form of government, D.U.I. offenders from consideration for work release until those offenders had served the minimum mandatory sentences for D.U.I. violated the equal protection clauses of the federal and state constitutions. See, U.S. Const. amend. XIV; Tenn. Const. art. I, § 8, art. II §8. In Tester, the trial court had held this statutory scheme unconstitutional and had elided<sup>3</sup> those portions of the statutory scheme which limited its application to only three counties. Thus, the trial court's actions had the effect of making immediate work release available to D.U.I. offenders statewide without the necessity of service in jail of the mandatory minimum sentences. Although the Supreme Court agreed that the statutory scheme was unconstitutional, the Court concluded that the doctrine of elision was inapplicable since it was clear the legislature would not have passed

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<sup>3</sup>The "doctrine of elision" allows courts under appropriate circumstances when consistent with legislative intent, to elide unconstitutional portions of the statute and find the remaining provisions to be constitutional and effective. Tester, 879 S.W2d at 830.

this scheme if it were not limited in application to the three counties of Davidson, Shelby and Moore.

Following the Tester opinion, Davidson, Moore and Shelby counties were returned, with respect to D.U.I. work release consideration, to the same status as our other 92 counties, i.e., mandatory incarceration for the minimum D.U.I. sentence before work release consideration.

In the instant case, assuming arguendo that Tennessee Code Annotated Section 55-10-403(n) is unconstitutional, the doctrine of elision would not apply. The legislative history of Tenn. Code Ann. § 55-10-403(n) indicates that this provision was enacted in response to an extreme jail overcrowding problem in Davidson County. Prior to the enactment of this statute, approximately 2,000 people in Davidson County were waiting to serve the 48 hour mandatory incarceration period. As a result, there was a time lapse of as great as six (6) to eight (8) months between the date of an offender's conviction and the date of sentence service. Because incarceration was untimely following a conviction for driving under the influence, the deterrent effect of the mandatory incarceration period was considered by the legislature to be ineffective. Hearings on S. 2369, S. Transportation Comm., 97<sup>th</sup> Gen. Assembly (March 25, 1992).

Furthermore, the community service program implemented by Tenn. Code Ann. § 55-10-403(n) was an expansion project of a program already in existence in Davidson County. The previous program required all D.U.I. offenders in Davidson County to perform 80 hours of community service in addition to the mandatory incarceration period as part of supervised probation. Hearings on H. 2333, H. Judiciary Comm., 97<sup>th</sup> Gen. Assembly (March 11, 1992) (statement of

Judge James Everett). The then-existing program required offenders to perform janitorial duties, such as cleaning commodes and urinals and buffing floors, in public buildings. The implementation of this program saved the City of Nashville approximately \$2,000,000 per year in janitorial expenses. Moreover, the program was highly regulated, and those who did not perform their required public service hours were promptly incarcerated. Hearings on H. 2333, H. Judiciary Comm., 97<sup>th</sup> Gen. Assembly (March 11, 1992).

It is clear then that the legislature in passing Section 55-10-403(n) was addressing a particular problem in Davidson County only and would not have passed the statute with statewide application. See, Hearings on S.2369, Floor Debate, 97<sup>th</sup> Gen. Assembly (March 30, 1992) (indicating bill is to address a problem in Davidson County only).

It therefore appears that if Section 55-10-403(n) is constitutional then it has no application to Sullivan County and the appellant. The appellant under a constitutional scenario would still have to serve her minimum 48 hour D.U.I. sentence in incarceration before being considered for community service work. On the other hand, if Section 55-10-403(n) is unconstitutional, because the doctrine of elision is not applicable, the statute is of no effect and we are left with the general D.U.I. law which requires service of minimum mandatory sentences before a defendant is eligible for community service work. Under either scenario the result is the same for the appellant; she must serve her mandatory minimum sentence in incarceration.

This Court will not pass on the constitutionality of a statute unless absolutely necessary for the determination of the case and of the rights of the parties to the litigation. County of Shelby v. McWherter, 936 S.W.2d 923, 931

(Tenn. App. 1996) (citing Estrin v. Moss, 221 Tenn. 657, 430 S.W.2d 345, 352 (Tenn. 1968); see also, State v. Candra Ann Frazier, C.C.A. No. 03C01-9904-CC-00146, 1999 WL 1042322, Cocke County, (Tenn. Crim. App. Filed Nov. 18, 1999, at Knoxville).

As noted above we need not address the constitutionality of Section 55-10-403(n) since the result of this case would be the same regardless of the outcome of any constitutional inquiry.

Accordingly, the judgment of the trial court is AFFIRMED.

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JERRY L. SMITH, JUDGE

CONCUR:

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JOSEPH M. TIPTON, JUDGE

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THOMAS T. WOODALL, JUDGE